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In the Supreme Court of the United States

October Term, 1983

ELISSA MUELLER MILLER as personal representative of the Estate of Chester H. Miller, Deceased,

and

ANN BIGGS LEWIS as personal representative of the Estate of James W. Lewis, Deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

CAN A WRONGFUL DEATH ACTION RESULTING FROM NEGLIGENCE OF A LAND BASED AIR TRAFFIC CONTROLLER EMPLOYED BY THE UNITED STATES BE BROUGHT UNDER THE FEDERAL TORT CLAIMS ACT WHERE THE NEGLIGENCE RESULTS IN AN AIR CRASH IN INTERNATIONAL WATERS?

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JURISDICTIONAL STATEMENT

The decision from which this petition is brought was entered on February 27, 1984, by the United States Court of Appeals, Eleventh Circuit, and is not yet reported. The statute conferring jurisdiction on this Court to review by certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED

46 U.S.C. § 761, the Death on the High Seas Act, provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. § 745, of the Suits in Admiralty Act, provides:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: . . .

STATEMENT OF THE CASE

Decedents were killed in an air crash in international waters on a flight from the Bahama Islands to Florida, on May 29, 1976. On May 25, 1978, plaintiffs filed a claim against the United States pursuant to the requirements of the Federal Tort Claims Act (FTCA), alleging negligence of an air traffic controller in Miami. The United States took no action with respect to the claim and on November 13, 1980, plaintiffs filed suit against the United States under the FTCA.

The United States answered, discovery took place, and in July of 1982, defendant moved to dismiss the complaints on the ground that plaintiffs' claims should have been brought in admiralty and there was no jurisdiction under the FTCA. Defendant further argued that, unlike the FTCA, there was a two-year statute of limitations under admiralty law, and this suit was filed more than two years after the incident.

The United States District Court for the Southern District of Florida granted the motion to dismiss and dismissed the complaint with prejudice on August 28, 1982. Petitioners appealed to the United States Court of Appeals, Eleventh Circuit, which affirmed in an opinion rendered on February 27, 1984 (A.1).

The basis for jurisdiction in federal court at the trial level is the Federal Tort Claims Act, 28 U.S.C. § 1346. Final judgments from federal district courts are appealable to federal circuit courts pursuant to 28 U.S.C. § 1291.

REASONS FOR ALLOWANCE OF WRIT

The Eleventh Circuit held that this case could have been brought in admiralty under the Death on the High Seas Act, 46 U.S.C. § 771. If the Eleventh Circuit was correct in this determination, then this action cannot be maintained under the Federal Tort Claims Act (FTCA) because jurisdiction under the FTCA and Suits in Admiralty Act (SIAA) is mutually exclusive. 28 U.S.C. § 2680(d). This action, while timely filed under FTCA, was not timely filed under the two-year statute of limitations provided in the SIAA, 46 U.S.C. § 745.

The Suits in Admiralty Act does not authorize actions for wrongful death except under the Death on the High Seas Act, 46 U.S.C. § 761, which provides:

> Whenever the death of a person shall be caused by *wrongful act, neglect, or default occurring on the high seas* beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. (Emphasis added)

The emphasized language above makes it clear that the only wrongful death actions which can be brought in admiralty are those ". . . caused by wrongful act, neglect, or default occurring *on the high seas* . . .". In the present case, while the plane crash occurred on the high seas, the negligence was that of a federal land-based air traffic controller in Miami, Florida.

Notwithstanding that the wrongful act or neglect in this case did not occur on the high seas as required by the Death on the High Seas Act, the Eleventh Circuit held that it was still an admiralty case which has a two-year statute of limitations, not a federal tort claims case, which has a four-year statute of limitations, and affirmed the dismissal as being barred by the statute of limitations. The Eleventh Circuit rested its decision on what it characterized as ". . . the now famous footnote 20" in this Court's opinion in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972).

This Court's opinion in *Executive Jet* resulted in confusion, which is apparent from a reading of the opinion of the Eleventh Circuit in the present case, and which this Court recognized in *Foremost Insurance Company v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654 (1982).

Whether the death on the high seas resulting from land-based negligence of the Federal Government is a federal tort claims case or an admiralty case under the Death on the High Seas Act is an important question of federal law, about which there is confusion which should be settled by this Court. A further additional reason why this Court should review this case is because the decision of the Eleventh Circuit in the present case is in conflict with the language of this Court in *Executive Jet,* supra.

The confusion in this area of the law arises from *Executive Jet,* supra, in which an aircraft struck a flock of seagulls as it was taking off from a lakefront airport in Cleveland as a result of which the craft ultimately crashed and sank in the navigable waters of Lake Erie. Plaintiff brought suit for the loss of the aircraft (there were no injuries or deaths) against individuals and the

City of Cleveland, as the operator of the airport, based on negligence, invoking admiralty jurisdiction. The trial court held the suit was not cognizable in admiralty and dismissed for lack of jurisdiction. The Sixth Circuit affirmed on the ground that the alleged tort occurred on land before the aircraft was over the water. *Executive Jet* is not on all fours because it did not involve a wrongful death and accordingly did not involve the Death on the High Seas Act. This Court made a number of statements in *Executive Jet*, however, which are to the effect that where the negligence occurs on land the resulting air crash in the sea is *not an admiralty case*, which is in conflict with the opinion in the present case. This Court stated on page 253 (all emphasis is added):

> Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; *if the wrong occurred on land, it is not.* As early as 1813, Mr. Justice Story, on Circuit, stated this general principle:
>
> > 'In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.' Thomas v. Lane, 23 Fed.Cas. pp. 957, 960, No. 13,902 (C.C. Me).

This was called the locality test. This Court also discussed a second test on page 261 as follows:

> In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

II

> One area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation. For the reasons discussed above and those to be discussed, we have concluded that *maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases.*

The Court further stated on page 268:

> All these and other difficulties that can arise in attempting to apply the locality test of admiralty jurisdiction to aeronautical torts are, of course, attributable to the inherent nature of aircraft. Unlike waterborne vessels, they are not restrained by one-dimensional geographic and physical boundaries. *For this elementary reason, we conclude that the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters—whatever that means in an aviation context—is not of itself sufficient to turn an airplane negligence case into a "maritime tort."* It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a

significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary. (Emphasis added)

This Court stated on page 270:

> Rules and concepts such as these are wholly alien to air commerce, whose vehicles operate in a totally different element, unhindered by geographical boundaries and exempt from the navigational rules of the maritime road. *The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water.* Indeed, in contexts other than tort, Congress and the courts have recognized that, because of these differences, aircraft are not subject to maritime law. Although dangers of wind and wave faced by a plane that has crashed on navigable waters may be superficially similar to those encountered by a sinking ship, *the plane's unexpected descent will almost invariably have been attributable to a cause unrelated to the sea*—be it pilot error, defective design or manufacture of airframe or engine, *error of a traffic controller at an airport,* or some other cause; *and the determination of liability will thus be based on factual and conceptual inquiries unfamiliar to the law of admiralty. It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence "occurs" while a plane is flying over such waters is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction.* (Emphasis added)

It appears to be clear from the above language, particularly that emphasized, that this Court did not intend

that land-based air traffic controller negligence resulting in a plane going down in the high seas would be an admiralty case. The Eleventh Circuit, however, based its decision on footnote 20 of *Executive Jet,* wherein this Court stated:

> Of course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court.

In deciding that the present factual situation constituted an admiralty case, the Eleventh Circuit stated:

> . . . In this instance the airplane crashed into waters more than one marine league from the shores of the continental United States, in accordance with the Supreme Court's language in footnote 20 of *Executive Jet.* Moreover, *there is a significant relationship to traditional maritime activity, because the trip between the Bahamas and the United States has traditionally been accomplished by ship,* and would, of necessity, have to be accomplished by ship but for the introduction of the airplane into this forum. Jurisdiction is properly found pursuant to the SAA. (Emphasis added)

The above emphasized language is in direct conflict with the statements made by this Court in *Executive Jet,* set forth above, such as the one on page 270:

> . . . It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence "occurs" while a plane is flying over such waters is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction.

The Eleventh Circuit relied on *Roberts v. United States,* 498 F.2d 520 (9th Cir. 1974), however the Ninth Circuit also suggested this area of the law is far from clear, noting in footnote 2:

> Under the FTCA, a tort claim arises at the place where the negligent act or omission occurred and not where the negligence had its "operative effect," (i.e., the situs of injury). Richards v. United States, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

The 9th Circuit further stated in *Roberts* in footnote 3:

> A distinct problem is the determination of where an aviation tort "occurs." Unlike the rule developed under the Federal Tort Claims Act, *see supra,* n. 2, in applying the maritime locality test a tort is deemed to occur not where the wrongful act or omission had its inception, but at the place where it became operative, i.e., place of injury. Oppen v. Aetna Insurance Co., 485 F.2d 252, 256 (9th Cir. 1973); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (6th Cir. 1967); Wilson v. Transocean Airlines, 121 F. Supp. 85, 92 (9 N.D.Cal. 1954). The Supreme Court in *Executive Jet,* discussed the difficulties inherent in determining tort locus in the aviation context, *but the Court did not propose another test.* . . . (Emphasis added)

The present state of the law constitutes a trap for the unwary. It is only by virtue of the Death on the High Seas Act that wrongful death claims can be brought in admiralty and the language of that Act clearly authorizes these claims only where the death is caused by wrongful act "occurring on the high seas." It thus appears

to be clear that where the wrongful act occurs on land, as it did in this case, there is no admiralty jurisdiction.

Even one of the leading texts, *Kreindler*, Volume 1, Aviation Accident Law, § 5.01(3) states:

> Since the geographical application of the Federal Tort Claims Act is held to be co-extensive with the sovereignty of the United States, the Federal Tort Claims Act would apply to maritime matters, including death, personal injury, or property damage occurring on the high seas.

Admiralty has a shorter statute of limitations than the Federal Tort Claims Act. Plaintiffs timely brought this suit under the Federal Tort Claims Act but, by virtue of a footnote in *Executive Jet*, which was clearly dicta since *Executive Jet* did not involve a death claim, the Eleventh Circuit has now held that the Death on the High Seas Act does not mean what it most clearly says, resulting in plaintiffs being denied the right to recover for the deaths of their husbands.

CONCLUSION

This case involves an important question of Federal law which has not been settled by this Court. In addition, the holding by the Eleventh Circuit that a plane trip over international waters bears a significant relationship to traditional maritime activity is in direct conflict with the statements of this Court in *Executive Jet*. It is therefore respectfully submitted that certiorari should be granted.

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APPENDIX

Elissa Mueller MILLER, as Personal Representative of the Estate of Chester H. Miller, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

Ann Biggs LEWIS, as Personal Representative of the Estate of James W. Lewis, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

Nos. 82-5992, 82-6034.

United States Court of Appeals, Eleventh Circuit.

Feb. 27, 1984.

Appeals were taken from orders of the United States District Court for the Southern District of Florida, James C. Paine, J., dismissing, as untimely, suits arising out of airplane crash in international waters. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) suits, which alleged land-based negligence on part of air traffic controller resulting in airplane crash in international waters, were within admiralty jurisdiction, and (2) since suits were filed more than two years after crash, they were untimely under Suits in Admiralty Act.

Affirmed.

1. Admiralty (Key) 22

Suits alleging land-based negligence on part of air traffic controller resulting in airplane crash in international waters were within admiralty jurisdiction. Suits in Admiralty Act, § 1 et seq., as amended, 46 U.S.C.A. § 741 et seq.

2. Death (Key) 37

Complaints alleging negligence on part of air traffic controller resulting in airplane crash in international waters were filed two years after crash; therefore, under Suits in Admiralty Act, they were untimely. Suits in Admiralty Act, § 5, as amended, 46 U.S.C.A. § 745.

Appeals from the United States District Court for the Southern District of Florida.

Before HENDERSON and HATCHETT, Circuit Judges, and JONES, Senior Circuit Judge.

HATCHETT, Circuit Judge:

These appeals are from orders of the district court concerning an airplane crash in which the court dismissed appellants' complaints as being barred by the statute of limitations of the Suits in Admiralty Act, 46 U.S.C.A. § 745. Upon examination of Supreme Court precedent and the law of other circuits, we affirm the judgments of the district court.

FACTS

On or about May 28, 1976, Chester H. Miller and James W. Lewis flew from Freeport, Bahamas, bound for Palm Beach, Florida, International Airport in a private plane. The plane crashed in international waters forty

miles southeast of West Palm Beach. Both men were killed.

Relatives of the two deceased men filed suit against the owners of the airplane under maritime jurisdiction pursuant to the Death on the High Seas Act (DOHSA), 46 U.S.C.A. § 761. Section 761 creates a cause of action for wrongful death under the Suits in Admiralty Act (SAA), 46 U.S.C.A. § 741 et seq. In November, 1980, Alicia Mueller Miller, as personal representative of the estate of Chester Miller, filed a complaint against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 1346(b) and 2671 et seq. In May, 1981, Ann Biggs Lewis, as personal representative of the estate of James Lewis, also filed a complaint against the United States under the FTCA. The United States moved to dismiss the complaints on the ground that the claims were based in admiralty rather than the FTCA. The United States also asserted that Miller and Lewis had failed to file their complaints within the two-year statute of limitations for suits brought pursuant to the SAA.

On August 25, 1982, the district court issued its order granting the government's motion against Miller and stating that the case was cognizable as an admiralty suit under the DOHSA. Five days later, in an identically worded opinion, the district court also granted the government's motion against Lewis. The district court denied motions for rehearing and/or reconsideration in both cases. This appeal ensues. We consolidated these cases for oral argument and decision.

In these cases of first impression in this circuit, the sole issue for resolution is whether land based negligence resulting in an airplane crash into international waters is within admiralty jurisdiction.

DISCUSSION

Lewis and Miller contend that, where death has resulted due to the negligence of a land based air traffic controller, admiralty jurisdiction cannot apply because the negligence occurred on land and the activity does not bear a significant relationship to traditional maritime activity.

The government contends that an airplane crash into international waters, which results from air traffic controller negligence, gives rise to an admiralty suit cognizable under the DOHSA, because it involves a traditional maritime activity, the transport of passengers across international waters.

Title 46 U.S.C.A. § 761, (DOHSA), provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas *beyond a marine league* from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. [Emphasis added.]

The DOHSA provides that death actions against the United States are within the jurisdictional limits of the Suits in Admiralty Act. Yet, an action brought under the DOHSA, a part of the SAA, cannot be maintained under FTCA because jurisdiction under the FTCA and SAA are mutually exclusive. *See* 28 U.S.C.A. § 2680(d).

Any determination of whether a tort is or is not within maritime jurisdiction begins with the Supreme Court's test for admiralty torts, enunciated in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). In *Executive Jet*, an aircraft taking off from a Cleveland airport struck a flock of seagulls. The plane lost power and crashed a short distance from the runway into the waters of Lake Erie. The plaintiff brought suit against the city of Cleveland, as operator of the airport, charging negligence. The suit was brought pursuant to admiralty jurisdiction. The district court dismissed for lack of jurisdiction stating that there was no admiralty jurisdiction. The Sixth Circuit affirmed, stating that the alleged tort occurred on land, and not on water.

The Supreme Court in deciding the question provided a test to determine whether a negligence suit resulting from an air crash into the seas is within admiralty jurisdiction:

> Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.

Executive Jet, 409 U.S. at 253, 93 S.Ct. at 497. After stating the locality test, the Supreme Court noted that locality in itself could not be dispositive in situations involving aircraft:

> One area in which locality as the exclusive test of admiralty tort jurisdiction has given rise to serious problems in application is that of aviation. For the reasons discussed above and those to be discussed, we have concluded that maritime locality alone is

not a sufficient predicate for admiralty jurisdiction in aviation tort cases.

Executive Jet, 409 U.S. at 261, 93 S.Ct. at 501. The Supreme Court noted that airplanes are not restricted by the same physical boundaries as water vessels. For this reason, the fact that the tort occurred on or over navigable waters is not dispositive in itself; it does not automatically turn negligence into a maritime tort. More important to an examination of when admiralty jurisdiction attaches is the requirement that "the wrong bear a significant relationship to traditional maritime activity." *Executive Jet,* 409 U.S. at 268, 93 S.Ct. at 504. The Supreme Court held that there was no admiralty jurisdiction in *Executive Jet* because there was no significant relationship between the accident and the traditional maritime activity involving navigation and commerce on navigable waters. *Executive Jet,* 409 U.S. at 272, 93 S.Ct. at 506.

The Supreme Court added a caveat to its holding on the specific facts of *Executive Jet,* stating in the now famous footnote 20: "Of course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas *beyond a marine league* from the shore of a State may clearly be brought in a federal admiralty court." *Executive Jet,* 409 U.S. at 271, n. 20, 93 S.Ct. at 506, n. 20 (emphasis added).

The specific significance of footnote 20, and the issue of when an alleged aviation tort bears a significant relationship to traditional maritime activity, has not yet been addressed by the Eleventh Circuit. This question has been addressed by other circuits. In *Kelly v. Smith,* 485 F.2d 520, 524 (5th Cir.1973), *cert. denied sub nom., Chicot Land Company v. Kelly,* 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974), the Fifth Circuit stated that maritime locality is no longer sufficient to sustain maritime jurisdiction.

Rather, the wrong must bear a significant relationship to maritime activity. The *Kelly* court then construed *Executive Jet* as suggesting that an aircraft performing a function traditionally performed by waterborne vehicles might bear a significant relationship. *Kelly*, F.2d at 525. The Fifth Circuit has construed the *Executive Jet* language similarly in other cases, upholding admiralty jurisdiction where an airplane or helicopter crashed into water on a flight between points not within the continental United States. *See Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir.1980); *Higgenbotham v. Mobile Oil Corp.*, 357 F.Supp. 1164 (W.D.La.1973), *aff'd in part*, 545 F.2d 422 (5th Cir.1977), *rev'd on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). In these cases, the aircraft were performing functions traditionally performed by waterborne vehicles.

The Fifth Circuit, however, in *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960), upheld a suit brought under FTCA jurisdiction for a death occurring on the high seas. The facts centered on the sinking of a ship. The plaintiffs brought suit, claiming negligence on the part of the land based government employees in charge of the rescue effort. *Gavagan* is distinguishable from this case. Although the Fifth Circuit in *Gavagan* held that the government could be liable for land based negligence which caused injury at sea pursuant to the FTCA, rather than pursuant to the SAA, *Gavagan* arose and was decided prior to the 1960 amendment to the SAA which changed the nature of SAA jurisdiction.

Prior to the 1960 amendment, the original SAA extended only to claims which involved government vessels or cargo. The Fifth Circuit, in *McCormick v. United States*, 680 F.2d 345, 349 (5th Cir.1982), recognized the significant change in jurisdiction brought about by the 1960 amendment:

> In 1960, however, Congress amended section 2 of the SAA, which now provides that the SAA applies not only in cases where government vessels and cargo are involved, but also "[i]n cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained . . . ." 46 U.S.C. § 742. Every circuit to address the effect of this amendment, including our own, has held that the language "if a private person or property were involved" extended the coverage of the SAA to include all maritime tort claims against the United States where the plaintiff would have an action in admiralty were the defendant a private person rather than the government. [Footnote omitted.]

The Fifth Circuit went on to state that prior to the 1960 amendment, wrongful death actions occurring at sea were unquestionably actionable under the FTCA, as the SAA did not provide a remedy. *McCormick*, 680 F.2d at 349, n. 5.

We note further that the *Gavagan* court did not have to wrestle with the Supreme Court's *Executive Jet* language on whether admiralty jurisdiction attaches to an airplane crash occurring more than one marine league from shore because *Gavagan* involved the traditional sinking of a ship at sea.

The Ninth Circuit, in a case similar to the one before us, also found admiralty jurisdiction to be appropriate. In *Roberts v. United States*, 498 F.2d 520 (9th Cir.), *cert. denied*, 419 U.S. 1070, 95 S.Ct. 656, 42 L.Ed.2d 665 (1974), a cargo plane crashed into navigable waters more than 1,500 feet short of an Okinawa runway. The plaintiffs in *Roberts* charged negligence on the part of the air traffic controllers and brought suit pursuant to the FTCA. The Ninth Circuit stated that the actions could not be main-

tained under the FTCA, finding that the SAA applied, encompassing aviation wrongful death actions against the United States. *See Roberts,* 598 F.2d at 526.

In *Roberts,* the Ninth Circuit noted that aviation posed a distinct problem in determining admiralty jurisdiction. *See Roberts,* 498 F.2d at 523, n. 3. Yet, the *Roberts* court resolved the problem in part by looking to the trans-oceanic nature of the attempted air voyage, an activity "readily analogized with traditional maritime activity." *Roberts,* 498 F.2d at 524. In this and other cases where airplanes have crashed into navigable waters on voyages where a ship or boat would have otherwise been used for the same purposes, more than one marine league from the shores of the continental United States, the Ninth Circuit has found admiralty jurisdiction. *See T.J. Falgout Boats, Inc. v. United States,* 508 F.2d 855 (9th Cir.1974), *cert. denied,* 421 U.S. 1000, 95 S.Ct. 2398, 44 L.Ed.2d 667 (1975); *Stoddard v. Ling-Temco-Vought, Inc.,* 513 F.Supp. 314 (C.D.Cal.1980).*

[1] We agree with the rationales of the Ninth and Fifth Circuits. In this instance the airplane crashed into

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**But see American Home Assurance Company v. United States,* 389 F.Supp. 657 (M.D.Pa.1975). In this Third Circuit case, factually similar to the instant case, the district court concluded that "no traditional maritime activity has been demonstrated here, [and] this Court holds that the instant suit is not cognizable under the Suits in Admiralty Act. . . ." *American Home Assurance,* 389 F.Supp. at 658. This case demonstrates the only known court, as of this writing, to reject the SAA as the proper jurisdictional forum for a suit involving a plane crash into navigable water resulting from on-shore negligence. We note that the holding is distinguishable, however, in that the crash resulted enroute from a spot in the continental United States to another spot, an island, also in the continental United States. The district court in the instant case, cognizant of the holding in *American Home Assurance Company,* distinguished its determination from that case by noting that the transportation effected in *American Home* was between points in the United States, as opposed to points from within to without the United States as is here the case.

waters more than one marine league from the shores of the continental United States, in accordance with the Supreme Court's language in footnote 20 of *Executive Jet.* Moreover, there is a significant relationship to traditional maritime activity, because the trip between the Bahamas and the United States has traditionally been accomplished by ship, and would, of necessity, have to be accomplished by ship but for the introduction of the airplane into this forum. Jurisdiction is properly found pursuant to the SAA.

Having determined that the correct jurisdiction is within the SAA rather than the FTCA, we now turn to whether the district court correctly dismissed the suits.

[2] Title 46 U.S.C.A. § 745 of the SAA states that suits "may be brought only within two years after the cause of action arises . . . ." Both Miller and Lewis were killed on or about May 29, 1976. Lewis's estate filed a complaint on May 6, 1981. Miller's estate filed a complaint on November 13, 1980. In each case the complaints were filed more than two years after the running of the statute of limitations. The district court correctly dismissed the actions. *See Kindrew v. United States,* 352 F.Supp. 277 (M.D.Fla.1972), *aff'd,* 749 F.2d 49 (5th Cir. 1973).

CONCLUSION

Accordingly, we affirm the decisions of the district court dismissing the actions of appellants Miller and Lewis as being time barred under the applicable SAA statute of limitations.

AFFIRMED.

No. 83 - 1819

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FILED
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In the Supreme Court of the United States

October Term, 1983

ELISSA MUELLER MILLER as personal representative of the Estate of Chester H. Miller, Deceased,

and

ANN BIGGS LEWIS as personal representative of the Estate of James W. Lewis, Deceased,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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(Filed August 28, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

80-8391-CIV-JCP

ELISSA MUELLER MILLER as personal representative of the Estate of Chester H. Miller, Deceased

v.

UNITED STATES OF AMERICA

This case is a case in admiralty, cognizable under the Death on the High Seas Act. Determination of whether a tort is maritime traditionally depended upon the locality of the effect of the negligence The Supreme Court added a second test in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972), that of nexus with traditional maritime activity. The case at hand meets both of these tests. Additionally, it comes within the purview of the Death on the High Seas Act as an aircraft crash into the high seas beyond one maritime league from shore. *Executive Jet,* 502. This court notes that the crash in *Executive Jet* differed from the crash in this case in that there was no nexus with traditional maritime activity, because it involved a flight by land-based aircraft within points within the continental United States. It also was not cognizable under the Death on the High Seas Act since crashes into the Great Lakes are specifically excepted by 46 U.S.C. Section 767.

46 U.S.C. Section 742 of the Suits in Admiralty Act allows suit to be brought against the United States where

if a private person were involved a proceeding in admiralty could be maintained. Thus, wrongful death actions against the United States are within the purview of the Suits in Admiralty Act. This includes both torts under the Death on the High Seas Act and under general maritime law. See *Roberts v. United States,* 498 F.2d 520, 526 (9th Circ. 1974).

Actions under the Federal Torts Claims Act and under the Suits in Admiralty Act are mutually excludable. This action may not be maintained pursuant to the Federal Torts Claim Act where it has been filed after the running of the statute of limitations set up by the Suits in Admiralty Act. It is plain to the court from the record that the plaintiff had notice that this was properly a suit in admiralty as the plaintiff filed a prior suit arising from the same incident in this very court under admiralty jurisdiction.

Accordingly, it is ORDERED and ADJUDGED that this case is DISMISSED with prejudice and the clerk is instructed to close the file.

DONE and ORDERED this 25th day of August, 1982, at Miami, Florida.

/s/ James C. Paine
James C. Paine
United States District Judge

cc: Charles A. Nugent
Richard H. Willits
Kathlynn G. Fadely
Barbara Gazeley
William Pruitt
U.S. Attorney - Miami

(Filed August 31, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

81-8176 CIV-JCP

ANN BIGGS LEWIS as personal representative of the Estate of James W. Lewis, Deceased

v.

UNITED STATES OF AMERICA

This case is a case in admiralty, cognizable under the Death on the High Seas Act. Determination of whether a tort is maritime traditionally depended upon the locality of the effect of the negligence The Supreme Court added a second test in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972), that of nexus with traditional maritime activity. The case at hand meets both of these tests. Additionally, it comes within the purview of the Death on the High Seas Act as an aircraft crash into the high seas beyond one maritime league from shore. *Executive Jet,* 502. This court notes that the crash in *Executive Jet* differed from the crash in this case in that there was no nexus with traditional maritime activity, because it involved a flight by land-based aircraft within points within the continental United States. It also was not cognizable under the Death on the High Seas Act since crashes into the Great Lakes are specifically excepted by 46 U.S.C. Section 767.

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Accordingly, it is ORDERED and ADJUDGED that this case is DISMISSED with prejudice and the clerk is instructed to close the file.

DONE and ORDERED this 30th day of August, 1982, at West Palm Beach, Florida.

/s/ James C. Paine
James C. Paine
United States District Judge

cc:
Kathlynn G. FAdely
Wm. H. Pruitt

Office - Supreme Court, U.S
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CLERK

No. 83-1819

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELISSA MUELLER MILLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHESTER H. MILLER, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1819

ELISSA MUELLER MILLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHESTER H. MILLER, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their wrongful death actions arising out of the crash into international waters of an airplane on an international flight are not subject to the two-year statute of limitations applicable to admiralty suits.

1. Petitioners' decedents were killed in the crash into international waters of an airplane on a flight from the Bahamas to Florida in 1976. In 1980, petitioners filed separate suits against the United States in the United States District Court for the Southern District of Florida, alleging jurisdiction and a right to recover under the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671 *et seq.*[1] The

[1]Petitioners had earlier brought lawsuits in federal court against the owner of the aircraft and the firm responsible for its upkeep, alleging land-based negligence in the maintenance, storage and repair of the

government moved to dismiss each suit on the grounds that it was based in admiralty[2] and was not filed within the two-year statute of limitations applicable to such suits, 46 U.S.C. 745. Pet. App. A3. The district court granted the motions and the court of appeals affirmed (Pet. Supp. App. A12, A14; Pet. App. A2).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

In *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249 (1972), this Court concluded that, in aviation tort cases, non-statutory admiralty jurisdiction requires that "the wrong bear a significant relationship to traditional maritime activity" (*id.* at 268). In dictum,[3] the Court noted, "[o]f course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may

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plane. Petitioner Miller alleged jurisdiction under the Death on the High Seas Act, 46 U.S.C. (& Supp. V) 761 *et seq.* (Civil Action No. 77-8142 (S.D. Fla. May 13, 1977)). Petitioner Lewis alleged jurisdiction under 28 U.S.C. 1333 (providing for exclusive federal admiralty and maritime jurisdiction), stating in paragraph 10 of her complaint that the death "occurred as a result of an activity which bears a significant relationship to traditional maritime activity" (Civil Action No. 77-8217 (S.D. Fla. July 18, 1977)). See Pet. Supp. App. A12, A14.

[2]The Federal Tort Claims Act does not apply to suits in admiralty (28 U.S.C. 2680(d)). Suits against the United States based on the Death on the High Seas Act must allege an independent jurisdictional ground, because that Act does not contain a waiver of sovereign immunity. *Roberts* v. *United States*, 498 F.2d 520, 525 n.8 (9th Cir.), cert. denied, 419 U.S. 1070 (1974). Here, the waiver would have to be found in the Suits in Admiralty Act, 46 U.S.C. (& Supp. V) 741 *et seq.* See generally *Blanco* v. *United States*, 464 F. Supp. 927 (S.D.N.Y. 1979).

[3]In *Executive Jet*, the aircraft crashed into Lake Erie a short distance from the runway. The Death on the High Seas Act does not apply to the Great Lakes or to deaths within one marine league of shore (46 U.S.C. 761, 767).

clearly be brought in a federal admiralty court" (*id.* at 271 n.20). The court of appeals correctly determined that the instant suits were within the admiralty jurisdiction based both on the "significant relationship" test of *Executive Jet* and on the more narrow language of the opinion specifically addressing the statute applicable to crashes, such as this one, into international waters (Pet. App. A9-A10).

Since *Executive Jet* was decided, the courts of appeals have uniformly held that victims of airplane crashes over navigable waters, on journeys that historically could have been made only by sea-going vessels, may invoke the federal admiralty jurisdiction. See *Ledoux* v. *Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980) (per curiam); *Roberts* v. *United States*, 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 1070 (1974); *T.J. Falgout Boats, Inc.* v. *United States*, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975).[4] This Court noted in *Executive Jet* (409 U.S. at 263-264 (footnote omitted)):

> [M]any actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases. Indeed, it

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[4]Accord, *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314 (C.D. Cal. 1980); *Higginbotham* v. *Mobil Oil Corp.*, 357 F. Supp. 1164, 1167 (W.D. La. 1973), aff'd in relevant part and rev'd in part, 545 F.2d 422, 424 n.1 (5th Cir. 1977), rev'd on other grounds, 436 U.S. 618, 619 n.2 (1978). The only decision to the contrary of which we are aware, *American Home Assurance Co.* v. *United States*, 389 F. Supp. 657 (M.D. Pa. 1975), was distinguished by the courts below because it involved transportation between points within the United States (Pet. App. A9 n.*). Moreover, that case did not involve allegations under the Death on the High Seas Act, and so this Court's observations in *Executive Jet*, 409 U.S. at 271 n.20, were inapplicable.

may be considered as settled today that this specific federal statute gives the federal admiralty courts jurisdiction of such wrongful-death actions.

There is no reason for further review of such a settled question by this Court.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JUNE 1984

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[5]Petitioners' suggestion that they were led astray by a literal reading of the Death on the High Seas Act (Pet. 10-11) is without substance. Not only did *Executive Jet* clearly state that suits such as these are within the admiralty jurisdiction, but petitioners also filed other lawsuits arising out of this crash, alleging the admiralty jurisdiction that they now claim they could not have foreseen (Pet. Supp. App. A12, A14). See note 1, *supra*. Moreover, their reliance on 1 L. Kriendler, *Aviation Accident Law* § 5.01(3) (1963) at 200-201 (Pet. 11), is misplaced. Section 5.01(3) addresses the foreign country exemption of the Federal Tort Claims Act, 28 U.S.C. 2680(k), not the admiralty exemption, 28 U.S.C. 2680(d). Elsewhere Kriendler expressly states (§ 2.10[b][i]) that, "where death is caused in an airplane accident in or above the high seas it is clear that a cause of action exists in admiralty under the Death on the High Seas Act" (citations omitted). Finally, *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 318-319 (C.D. Cal. 1980), expressly rejected the argument that an allegation of land-based negligence takes a case out of the Death on the High Seas Act and makes it cognizable under the Federal Tort Claims Act.